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# Evidence in a Different Voice: Some Thoughts on Professor Jonakait's Critique of a Feminist Approach

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# RESPONSE

## EVIDENCE IN A DIFFERENT VOICE: SOME THOUGHTS ON PROFESSOR JONAKAIT'S CRITIQUE OF A FEMINIST APPROACH

AVIVA ORENSTEIN\*

Professor Jonakait and I disagree about the relationship between evidence law and culture. Even assuming that Professor Jonakait's black-letter characterizations are entirely correct, the question remains: how do we understand the excited utterance exception, however neutrally it is framed?

In my article I applied feminist scholarship to analyze how gendered notions of truth and credibility might influence evidence law.<sup>1</sup> I examined the hold the excited utterance exception has on our cultural imaginations and questioned how it reflects general

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1. Specifically, I argued that the criteria of the excited utterance, though they may reflect the experience of some speakers, are at odds with the practical experience of rape victims, who often do not make prompt, excited declarations. Although the excited utterance exception may reflect the sincere responses of some speakers, it is underinclusive. Therefore, I proposed an additional exception for rape survivors. See Aviva Orenstein, "MY GOD!: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159 (1997).

Professor Jonakait objects to my use of Rape Trauma Syndrome, arguing that I did not demonstrate that victims tend to be calm or to delay reporting, and that those who do are more reliable. Courts and commentators, however, regularly cite Rape Trauma Syndrome to explain delay and calm demeanor. See, e.g., *People v. Hampton*, 746 P.2d 947, 952 (Colo. 1987) (allowing the use of Rape Trauma Syndrome evidence to aid the jury in determining what effect should be given to the victim's delay in reporting the rape); *People v. Taylor*, 552 N.E.2d 131, 138 (N.Y. 1990) (admitting Rape Trauma Syndrome evidence to explain victim's subdued demeanor following the attack); Lynn H. Schafran, *Women in the Criminal Justice System: Writing and Reading about Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1014 (1993); Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 429 (1985). It is not necessary to postulate that calm, delayed reports are always superior, but only that they are at least as valid as excited utterances. Such calm delayed reports are typical of many rape victims (most of whom never pursue legal remedies) and reflect a style of communication disfavored by the evidence rules. See *infra* note 21 and accompanying text (disputing the notion that either delayed or immediate reports are reliable, but both cannot be).

notions of credibility.<sup>2</sup> At bottom, Professor Jonakait seems to believe that such inquires are not only misguided, but illegitimate.

As an initial matter, we disagree about three basic evidence questions. First, Professor Jonakait argues that hearsay is about the right to cross examine and not about reliability.<sup>3</sup> The reasons behind hearsay are complex,<sup>4</sup> but traditional analysis has always focused on reliability as a chief rationale.<sup>5</sup> Most significantly, hearsay exceptions are largely explained by various theories of reliability.<sup>6</sup> Indeed, Professor Jonakait himself cannot escape explaining hearsay exceptions in terms of reliability: "When the hearsay concerns are reduced, the chances that a particular assertion is reliable is greater than for hearsay generally."<sup>7</sup>

Second, Professor Jonakait argues that the excited utterance doctrine "says nothing about the declarants' general credibility,"<sup>8</sup> and that, generally, hearsay law evaluates assertions, not declarants.<sup>9</sup> Assertions, however, are not disembodied words; they

2. Professor Jonakait seems careful to distance himself from the rationale of the excited utterance exception. See, e.g., Randolph Jonakait, "My God!" Is This How a Feminist Analyzes Excited Utterances? 4 WM. & MARY J. WOMEN L. 263, 269-70 (1998) ("Statements qualifying as excited utterances are at least theoretically thought to be more reliable than hearsay generally.") (emphasis added). Many commentators have indeed questioned the wisdom of the excited utterance exception. See, e.g., David P. Leonard, *Perspective on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 315 (1995) (discussing the questionable psychology of the excited utterance); James D. Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 203 (1995) ("Would you entrust your life to the judgment or perception of a person who is acting under extreme stress or trauma?"). Professor Jonakait's goal is not to provide a spirited defense of the excited utterance, but rather to demonstrate the illegitimacy of my feminist approach.

3. Jonakait, *supra* note 2, at 265.

4. Cf. Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 384 (1992) (agreeing that "cross-examination alone as the basis for insisting on live testimony and excluding hearsay is . . . reductionist.") (citing Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 77 (1987)).

5. *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017 (1996) ("Hearsay rules . . . prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable."); cf. Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 497 (1987) (noting and challenging the "essential premise" in the hearsay debate "that reliability is the principal focus of the hearsay rule").

6. See Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 683 ("Reliability has long been viewed as the primary justification for recognizing exceptions to the hearsay rule") (citations omitted). See, e.g., *Idaho v. Wright*, 497 U.S. 805, 818 (1990) ("Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.") (citations omitted).

7. Jonakait, *supra* note 2, at 266.

8. *Id.*

9. See *id.* ("what is thought reliable is the assertion, not the declarant"). But cf., Roger C. Park, "I Didn't Tell Them Anything About You": *Implied Assertions as Hearsay Under the*

are associated with declarants in particular situations. In deciding the admissibility of the assertions we perforce draw conclusions about the declarants' trustworthiness. One need not posit a conscious intent to denigrate to believe that our rules of evidence express cultural preferences for some styles of communication over others.<sup>10</sup> Furthermore, one need not see a hearsay declarant's credibility as being impugned, but only in a specific context — such as charges of rape. Even in traditional evidence jurisprudence, a bright-line distinction between declarants' and assertions' reliability seems strained. A feminist analysis, concerned with context, would be particularly skeptical of such an artificial and decontextualized approach.<sup>11</sup>

Third, after acknowledging that raped women who are calm after the attack may be disbelieved, Professor Jonakait asserts that "[e]vidence law, however, does not cause this disbelief. Evidence law admits or excludes evidence; it does not believe or disbelieve witnesses."<sup>12</sup> Although evidence law is not the sole cause of disbelief of women reporting rape, evidence law both reflects and perpetuates cultural biases that lead to disbelief of women.<sup>13</sup> Such biases include the expectation of outraged cries and the distrust of delayed reports that are built into the excited utterance requirement.<sup>14</sup> Unquestionably, evidence law is, as Professor Jonakait asserts, a system for admitting and excluding evidence. But it is also much more. Evidence law shapes and reflects who and what are deemed credible. In essence, the rules of evidence direct acquisition of knowledge and describe our legal way of knowing things.<sup>15</sup>

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*Federal Rules of Evidence*, 74 MINN. L. REV. 783, 784 (1990) (delineating a declarant-oriented approach to hearsay and noting that "[h]earsay scholars tend to prefer the declarant definition to the assertion definition . . .").

10. Cf. Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 330 (1993) ("The first element in the lack of belief in women as witnesses has to do with general social expectations about how a credible speaker is supposed to sound: like a man.").

11. See Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223, 1231-32 (advocating use of feminist analysis to "explore a richer, more focused, complex and contextual analysis of the role of process.").

12. Jonakait, *supra* note 2, at 268 (citations omitted).

13. See generally Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996).

14. See Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992) (describing cultural stories that portray women who delay reporting rape as liars).

15. See Aviva Orenstein, Speech at the AALS Evidence Conference (Oct. 1996) (text on file with office of William & Mary Journal of Women and the Law); cf. Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1016-17 (1994) (discussing the normative function of evidence law).

At the heart of his argument, Professor Jonakait rejects the feminist critique's skepticism of so-called neutral rules.<sup>16</sup> Professor Jonakait's faith in the neutrality of the excited utterance exception is demonstrated by his rejection of the hypothesis that excited utterances may discriminate against rape victims. He argues that "[i]n reality, evidence law treats rape victims and their hearsay as it treats others."<sup>17</sup> In other words, once there is technically equal treatment, there cannot be discrimination even if the rule in operation mirrors the communication style and expectations of the dominant group. In forwarding this notion Professor Jonakait rejects a major premise of feminist jurisprudence.<sup>18</sup>

We do not live in a tidy doctrinal world unruffled by culture and unshadowed by nuance where truth is out there to be discovered.<sup>19</sup> Therefore, the formal, often dualistic categories upon which Professor Jonakait insists are not helpful. No impermeable boundaries exist between the "substance" of rape law and evidentiary "procedure." Professor Jonakait, however, tries to draw such bright lines. He divides "evidence law" from "societal attitudes," rarely stopping to ponder how they might influence one another.<sup>20</sup> Professor Jonakait insists on false dichotomies, implying, for instance, that if delayed rape reports are reliable, then immediate reports must not be, as if there were only one credible model against

16. Though Professor Jonakait has chosen to respond particularly to my piece, his philosophical disagreements with a feminist critique of evidence address a growing scholarly movement. See, e.g., Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 430-52 (offering insights into how the evidence rules may ignore the experiences of women and instead reflect male values and norms); Mack, *supra* note 10 (drawing on psychological research and gender task force reports to analyze women's problems in gaining respect and credibility in the courtroom); Rosemary Hunter, *Gender in Evidence: Masculine Norms v. Feminist Reform*, 19 HARV. WOMEN'S L.J. 127 (1996) (exploring questions of credibility and relevance, and arguing that women's stories must first be allowed into court, then they must be taken seriously); Scheppele, *supra* note 14; Taslitz, *supra* note 13; Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996).

17. Jonakait, *supra* note 2, at 271 (citation omitted).

18. See generally Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63 (1993).

19. For instance, at a recent conference at Hastings College of Law entitled, "Truth & Its Rivals," many speakers addressed the post-modern question of whether there is a truth to be uncovered by evidence law. See, e.g., Mirjan R. Damaška, *Truth in Adjudication*, Speech at Hastings College of Law (Sept. 1997) (transcript on file with office of *William & Mary Journal of Women and the Law*); see also David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L. J. 1005, 1016 (arguing that "the 'truth' of a proposition can never be fully demonstrated"); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 896 (noting "the epistemological maxim that truth is not self-evident; we can do no better than approximate it through the very processes we seek to evaluate").

20. Jonakait, *supra* note 2, at 270.

which victims can be measured.<sup>21</sup> Professor Jonakait distinguishes "principles" from "politics"<sup>22</sup> as if rape is somehow separate from power,<sup>23</sup> and feminism is somehow separate from politics. Furthermore, evidence rules are not apolitical.<sup>24</sup> The decision to read the rules as neutral is itself a political choice.<sup>25</sup> Professor Jonakait's failure to realize this reflects a retro-epistemology that has been largely eclipsed, even in evidence scholarship, which has been notably cautious in incorporating new perspectives.<sup>26</sup>

Professor Jonakait purports to be acting on behalf of feminism, warning that if my analysis were "taken seriously," these principles "could be particularly dangerous for feminism."<sup>27</sup> Professor Jonakait, however, offers no affirmative definition of feminism or alternate vision of what feminism could offer.<sup>28</sup> Aside from a brief mention of use of experts,<sup>29</sup> Professor Jonakait does not explain how feminism can be rescued and properly applied to evidence law.<sup>30</sup>

21. See *id.* at 273, 292. See Dawn M. DuBois, Note, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1105 ("women who are raped or sexually abused do not always react in a uniform manner") (citations omitted); cf. Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN L. 277, 280 (1993) ("The range of 'credible' stories is narrower than the range of true ones.") .

22. See Sheppele, *supra* note 4, at 166 (stating that the law "pretends to be above politics, prejudice, and partiality").

23. See Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997).

24. Congress itself recognized political and substantive aspects of the evidence rules when it refused to accept the Supreme Court's promulgation and insisted on treating them as statutory.

25. See generally Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995).

26. See Roger C. Park, *Evidence Scholarship, Old and New*, 75 MINN. L. REV. 849, 849 (1991) ("The best-known interdisciplinary movements have, however, had little or no influence on evidence scholarship."); Seigel, *supra* note 15, at 995 ("the major intellectual movements characterizing legal thought during the latter quarter of the twentieth century . . . have left evidence scholarship virtually untouched.") .

27. Jonakait, *supra* note 2, at 263.

28. Professor Jonakait seems to deny any special problems arising out of rape, stating that "[t]he victim can testify about the rape, just as I can testify about the damaged television I received." *Id.* at 268. More provocatively, he states "Victims can find burglary stressful too, as, I suspect, can those who find their checking accounts looted." *Id.* at 291. I reject the implication that there is little different about rape. Such an assertion is clearly at odds with a basic tenet of feminist theory and raises questions about what Professor Jonakait means by feminism. See Coombs, *supra* note 21; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

29. See Jonakait, *supra* note 2, at 293-94.

30. At one point, however, Professor Jonakait exhorts feminists to be "careful," lest, for instance, they inadvertently invite "[c]ourt-ordered psychiatric examination." *Id.*

Finally, Professor Jonakait's claim that my proposed survivor's statement exception to hearsay "would accomplish almost nothing"<sup>31</sup> is curious given his extended critique. It is also mistaken. Professor Jonakait asserts that although admitting survivors' statements "may determine whether jurors hear about a delay during direct examination or cross examination: [t]here is no reason to think that how or when the jurors learn this information will change their attitudes about the inferences to be drawn from the delay itself."<sup>32</sup> I am startled that he perceives no difference between: (1) admitting a prior consistent statement for the truth of the matter asserted in direct testimony to expand and fortify the narrative; and (2) admitting that same out-of-court statement, focusing not on its truth but on its timing, using the delay to impeach the witness. The first allows the woman to tell her story and to use additional sources to enrich the narrative and, within the limitations of Rule 403, have repeated what she said to others. It also permits the prosecution to draw any sting that a delayed report might have, allowing the victim to explain the delay rather than be confronted with it for the first time on cross examination. The second does not include the specifics of the statement and thereby screens out the voice and experience of the victim. It plays into rape myths and serves to reinforce the preference for immediate report and obvious excitement, reminding the jurors of the cultural presumption that "real" victims report immediately and act visibly upset.

On this issue of jury perception, I think Professor Jonakait is on to something. Rather than deem efforts to address individual rules as pointless, however, I would characterize them as a first step. Even if we address rule impediments to introducing delayed stories, and jurors are therefore able to hear rape survivors' delayed, calm reports, Professor Jonakait is quite right that jurors may nevertheless remain suspicious. This problem does not inspire me to abandon an attempt to rethink the rules. As courts begin to admit survivors' prior statements, however, we must consider how we can assist the jurors in overcoming their fondness for immediate reports and rape myths.<sup>33</sup>

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31. *Id.* at 269.

32. *Id.*

33. See Aviva Orenstein, *No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials*, \_\_\_ HASTINGS L. J. \_\_\_ (forthcoming 1998) (opposing proposed Federal Rule of Evidence 413 as unfair to defendants and instead advocating use of experts to educate the jury about rape myths).

Professor Jonakait's critique sounds an unmistakable note of anxiety and agitation. Indeed, his piece reads like one extended excited utterance, replete with the problems inherent in this genre of communication. The startling event seems to be the application of feminist jurisprudence to "neutral" evidence rules. Although his critique seems spontaneous and sincere, its perception suffers from limited perspective, and should not be taken for the truth of the matter asserted.